in force the caveat (per Lord Diplock in *Eng Mee Yong*'s case[1] at p 155).

With these principles in mind and having given the fullest consideration to submissions of counsel, I was satisfied that the caveator's claim did disclose a serious question to be tried as to whether there was any contract at all.

I next turned to consider the application by the chargee. I confess that I was at first blush much impressed by the submission of counsel for the chargee that the charge having been created nearly five years before the date of the alleged agreement, the caveator must be deemed to have had notice thereof by virtue of the doctrine of constructive notice. But, reflection revealed that the chargee's argument may be an oversimplification of the issue.

In *Eng Ah Mooi* v *OCBC*,[5] Salleh Abbas FJ at p 210 col 2 F to I said this:

> Just as a mortgage is not irredeemable, likewise a charge is not undischargeable. Under English law a mortgagee (this should read mortgagor) or any person interested in the mortgaged property has the right to demand (of) the mortgagee to redeem the mortgage on tendering the amount of debt together with interest thereon due on the mortgage. *Pearce* v *Morris* (1869-70) 5 LR Ch App 277, 230 and 231. We see no reason to hold that this rule of English law is inapplicable to the present appeal. In our view this rule is applicable although a lot has been said elsewhere about the differences between the common law mortgage and a charge under the Torrens system.

Accordingly, I felt bound to hold that the caveator had also succeeded in showing a triable issue as between himself and the chargee.

For the sake of completeness, I had also reminded myself of certain general considerations which I thought should guide me. I refer to the observations by that gifted lawyer Mr SK Das which were quoted with approval in *Jit Kaur* v *Parl Singh*[6] at p 201 and in *Macon Engineers Sdn Bhd* v *Goh Hooi Yin*[7] at p 58.

At p 325, on the purpose of a caveat, the learned author says this:

> It enables the caveator to retain the matter in status quo until his claim is adjudicated upon by the court and serves as a notice to the world at large of an outstanding equitable claim. The lodging of a caveat is really in the nature of the initiation of litigation, and only those persons should be entitled to initiate litigation who are entitled to litigate the matter of the dispute which is set up by the caveat, *Municipal District of Concord* v *Coles* (1905) 3 CLR 96 at p 108, per Griffith CJ.

And, at pp 347 and 348, on the approach which the courts should adopt when considering applications of the present kind, he says this:

> In dealing with applications for the extension of the operation of or for the removal of caveats against dealings with land it has always been the desire of the court to allow the parties the fullest opportunity to litigate any matter that may be in dispute between them. The court is loth to prevent parties litigating any right that they think they may possess: *In re Caveat of Lewis* (1903) 23 NZLR SC 581.

In all the circumstances, regard being had to the relevant principles, not forgetting the balance of convenience, the interests of all parties concerned and how best they may be protected, always keeping in mind the foreseeable positions at the final hearing, considerations of hardship in the meantime and other relevant discretionary factors, I was satisfied there were sufficient grounds for continuing in force the caveats, thus preserving the status quo, until the claim for specific performance is adjudicated upon by the Court.

In the result, both the applications were dismissed with costs and an early trial ordered of the suit herein.

Applications dismissed.

Solicitors: *Adnan Sundra & Low; Shearn Delamore & Co; Chew, Tan & Lim.*

Reported by *Teoh Ai Lin*

Re Lai Hua Kian, ex p Credit Corp (M) Bhd

HIGH COURT (KUCHING) — BANKRUPTCY NO 488 OF 1989
HAIDAR J
22 MARCH 1990

Bankruptcy — Bankruptcy notice — Issuing of — Whether solicitor could request for the issue of the bankruptcy notice on behalf of judgment creditor — Bankruptcy Act 1967, s 133 — Bankruptcy Rules 1969, r 9 & Form 4

The debtor made an application to object to the bankruptcy petition against him. The contention was that the petitioning creditor, being a corporation, had not specifically authorized any of its officers to issue the bankruptcy notice. Under s 133 of the Bankruptcy Act 1967, the petitioning creditor must appoint an officer under seal to act on its behalf.

Held, dismissing the debtor's objection and making a receiving order and an adjudication order:

(1) If a debtor intends to object to the creditor's petition, it cannot be done orally as r 117 of the Bankruptcy Rules 1969 (the 'Rules') provides that notice of his intention to oppose the petition has to be served three days before the hearing. However, in the circumstances, discretion was exercised under r 275 to give the debtor time to file the notice.

(2) The request for issue of a bankruptcy notice is prescribed in Form 4 to the appendix to the Rules. The form allows the solicitor to request for issue of the bankruptcy notice irrespective of whether the judgment creditor was a corporation or a firm or individual. It is clear that the request for issue of a

bankruptcy notice can be made by the judgment creditor or solicitor for the judgment creditor. As the solicitors in this case made the request, it appears that the petitioning creditor has complied strictly with Form 4.

(3) There is no provision in Form 9 for a solicitor to file the creditor's petition on behalf of a corporation or a firm or an individual. It would appear that in respect of a corporation it must be filed by an officer of the corporation authorized under seal. This should be so as the details specified in Form 9 must necessarily ascribe to an officer of the corporation who has knowledge of the details required to be inserted and thereby such officer should be duly authorized under seal.

(4) The bankruptcy notice is not an act of bankruptcy. Failure to comply with such a bankruptcy notice within the prescribed seven days is an act of bankruptcy which is then available to any creditor provided the petition is presented within six months.

Case referred to
1 *Re Winterbottom, ex p Winterbottom* (1886) 18 QBD 446 (refd)

Legislation referred to
Bankruptcy Act 1967 s 133
Bankruptcy Rules 1969 rr 9(1), 117, 275

Alvin Chong for the petitioner.
Loa Djin Liang for the respondent.

Cur Adv Vult

Haidar J: When the creditor's petition came for hearing on 19 February 1990, Mr Loa Djin Liang, counsel for Lai Hua Kian, the debtor, asked for an adjournment on the grounds that two persons were involved and the bankruptcy notice was issued wrongly, ie without the authorization. If I understood Mr Loa correctly, the debtor intended to object against the creditor's petition. I indicated that if that is the intention of the debtor, it cannot be done orally but he must comply with r 117 of the Bankruptcy Rules 1969 ('the Rules'). In fact going by the provision of r 117 of the Rules, he needs to serve the notice of his intention to oppose on the petitioning creditor and his solicitor, if known, three days before the day in which the petition is to be heard. Clearly, therefore, the debtor is in breach of r 117. Be that as it may, I was of the view that I should in the circumstances and for good cause exercise my discretion under r 275 of the Rules and accordingly gave the debtor time to file the notice as required under r 117 and adjourned the hearing to 2 March 1990. The notice was then duly served on the petitioning creditor's advocates and the petitioning creditor on 21 and 22 February 1990 respectively.

Mr Loa, counsel for the debtor, relied only on one ground to oppose the petition, ie the bankruptcy notice was improperly issued in the context of the bankruptcy legislation as the petitioning creditor, being a corporation, has not specifically authorized any of its officers to issue a bankruptcy notice. He submitted that by virtue of s 133 of the Bankruptcy Act 1967, the petitioning creditor must appoint an officer under seal to act on its behalf to institute all or any actions including the request for issue of a bankruptcy notice. Section 133 reads:

> For all or any of the purpose of this Act —
>
> (a) a corporation may act by any of its officers authorized in that behalf under the seal of the corporation;
> (b) a firm may act by any of its members;
> (c) a mentally disordered person or lunatic may act by his committee or curator bonis.

A bankruptcy notice is issued under r 9(1) of the Rules which reads as follows:

> A bankruptcy notice shall be issued by the Court in which a bankruptcy petition against the debtor may subsequently be filed.

The request for issue of a bankruptcy notice is prescribed in Form 4 to the appendix to the Rules. Looking at the prescribed Form 4, it is clear, in my view, that the request for issue of a bankruptcy notice can be made by the judgment creditor or solicitor for the judgment creditor. I think it is not disputed that the request for the issue of a bankruptcy notice in this case is not made by the petitioning creditor but by its solicitor, Goh & Partners (see encl 2). It appears that the petitioning creditor has complied strictly with the prescribed Form 4. Can it then be said that such action offends s 133 of the Bankruptcy Act 1967 or for that matter rule 215 of the Rules? Comparing Form 4 and Form 9 (relating to creditor's petition), it seems that in Form 9 there is no provision for a solicitor to file the creditor's petition on behalf of a corporation or a firm or an individual creditor and it would appear therefore that in respect of a corporation it must be filed by an officer of the corporation authorized in that behalf under the seal of the corporation. In my opinion, this should be so as the details specified in Form 9 must necessarily ascribe to an officer of the corporation who has knowledge of the details required to be inserted therein and thereby such officer should be duly authorized under seal by the corporation. In this petition it is not disputed that the petitioning creditor duly authorized its officer, Foong Yew Loen (see exh 'FLY-1'), before the petition was filed in the court. It should be noted that a bankruptcy notice is a notice issued by the court and served by a creditor who has obtained final judgment against the debtor. The bankruptcy notice is not an act of bankruptcy. Failure to comply with such a bankruptcy notice within the prescribed seven days is an act of bankruptcy, which is then available to any creditor provided the petition is presented within six months. A creditor includes a corporation (see r 3(b)) and as such any corporation who is for the time being entitled to enforce a final judgment or order has a right to issue a bankruptcy notice. The prescribed Form 4 further allows the solicitor for the judgment creditor to request for the issue of a bankruptcy notice irrespective of whether the judgment creditor is a corporation or a firm or an individual. The

wordings of our s 133 of the Bankruptcy Act 1967 are in pari materia with the wordings of s 149 of the English Bankruptcy Act 1914 (previously s 148 of the English 1883 Act). In the case of *Re Winterbottom, ex p Winterbottom*,[1] it would appear that the request for the issue of a bankruptcy notice by the solicitor was in order except that the receiving order was set aside solely on the ground that the proceeding was taken in the name of the liquidator and not in the name of the company when Cave J said at p 450:

> The request is made by FH Smyth, 'solicitor for HG Nicholson, of, & c, the liquidator of the Manchester and Oldham Bank Limited'. *Possibly this might have got over*, but the notice, the document actually served on the debtor, is headed 'Ex p Henry Grosvenor Nicholson, liquidator of the Manchester and Oldham Bank, Limited' and looking at the heading and at the contents I am unwillingly compelled to come to the conclusion that it is a proceeding taken in the name of Nicholson the liquidator, and not in the name of the company. (Emphasis added.)

Williams and Muir Hunter on Bankruptcy (9th Ed), in dealing with the matter relating to a request for the issue of a bankruptcy notice under r 136 of the English Bankruptcy Rules 1952, said at p 582, 'A solicitor can apply on behalf of a corporation without being authorized under seal.' It would seem clear to me that a solicitor can therefore request for the issue of a bankruptcy notice on behalf of a corporation as in this case without the necessity of having an authorized officer of the corporation to do so as seemed to be the contention of Mr Loa, counsel for the debtor. The petitioning creditor had complied strictly with the prescribed Form 4 and I therefore do not see any merits in the objection of the debtor and I accordingly would dismiss the debtor's notice with costs to the petitioning creditor. In the event, I would order that a receiving order and adjudication order be made against the debtor.

Order accordingly.

Solicitors: *Goh & Partners Advocates*; *Loa & Lim Advocates.*

Reported by *Yap Shao Sin*

Pendakwa Raya lwn Mohamed Khalid bin Hussein

MAHKAMAH TINGGI (KUALA LUMPUR) — PERBICARAAN JENAYAH WILAYAH PERSEKUTUAN NO 58-30-87
FAIZA TAMBY CHIK PK
22 MAC 1990

Acara Jenayah — Identiti barang-barang kes — Tuduhan mengedar dadah — Rantaian keterangan terputus — Keraguan ditimbulkan mengenai identiti barang kes — Kegagalan membuktikan kes prima facie — Kanun Acara Jenayah (FMS Cap 6), s 399

Yang tertuduh di dalam kes ini telah didakwa atas tuduhan melakukan kesalahan mengedar dadah merbahaya iaitu ganja seberat 965g. Ia telah ditahan apabila ia turun dari sebuah bas ekspres dan pada masa itu ia membawa satu beg berwarna biru. Di dalam beg itu terdapat satu beg plastik berwarna merah. Di dalam beg plastik itu terdapat pula satu bungkusan yang dibalut dengan kertas suratkhabar dan diikat dengan seutas tali merah yang mengandungi daun-daun kering yang disyaki ganja. Kemudiannya bungkusan itu telah dihantar ke Pejabat Kimia di Petaling Jaya dan diserahkan kepada seorang ahli kimia. Barang itu telah diambil semula dari Jabatan Kimia tetapi didapati ia telah dimasukkan dalam beg plastik warna putih. Juga ada kelainan dari segi warna, bentuk dan corak mengenai barang itu. Ahli kimia yang menganalisa barang itu tidak dipanggil untuk memberi keterangan untuk menjelaskan perkara perbezaan itu tetapi sebaliknya pihak pendakwaan telah menawarkannya kepada pihak pembelaan.

Diputuskan, membebaskan yang tertuduh:

Oleh kerana pihak pendakwaan telah gagal mengemukakan keterangan untuk mewujudkan rantaian keterangan, pihak pendakwaan telah gagal membuktikan kes prima facie di akhir kes pendakwaan, sebab timbul lompang di dalam kes pendakwaan dan oleh hal yang demikian, yang tertuduh hendaklah dibebaskan dan dilepaskan dari tuduhan terhadapnya.

[The accused in this case was charged with trafficking in a dangerous drug, to wit 964g of ganja. The accused had been detained as he alighted from an express bus and he was carrying a blue bag. The bag was examined and in it was found a red plastic bag and in the plastic bag was a parcel wrapped in newspaper and tied with a red string. The parcel contained dried leaves suspected to be ganja. The parcel was later sent to the Chemistry Department in Petaling Jaya. After the contents of the parcel were analysed, they were returned to the police. They were returned in a white plastic bag. The contents too were different in colour, form and shape from the dried leaves sent to the Chemistry Department. The chemist who analysed the dried leaves was not called to give evidence and to explain the differences. The prosecution however offered the chemist to the defence.

Held, acquitting the accused:

Because of the failure of the prosecution to call evidence to establish the chain of evidence relating to the exhibits in the case, no prima facie case was established at the end of the prosecution's case and therefore the accused must be acquitted and discharged.]

Kes-kes rujukan

1 *Abdullah Zawawi* lwn *Pendakwa Raya* [1985] 2 MLJ 16 (dirujuk)
2 *Su Ah Pin* lwn *Pendakwa Raya* [1980] 1 MLJ 75 (dirujuk)
3 *Teoh Hoe Chye* lwn *Pendakwa Raya* [1987] 1 MLJ 220 (dirujuk)